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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OLIN JOHNSTON MARTIN, JR., Defendant and Appellant.	G050805 (Super. Ct. No. 13CF2373) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed and remanded for resentencing.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Olin Johnston Martin, Jr., was convicted of forcible oral copulation, assault, and possession of cocaine. Defendant challenges his convictions because the trial court admitted evidence of his statements to the police, which he claims were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We do not address the trial court's allegedly erroneous admission of defendant's statements; the overwhelming evidence of defendant's guilt, separate and apart from his own statements to the police, convinces us beyond a reasonable doubt that the admission of the statements did not contribute to the jury's verdict. We affirm the judgment.

Defendant also argues, and the Attorney General concedes, that the matter must be remanded to the trial court for resentencing.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant and D.M. (the victim) worked together at a Walmart store. They did not have a romantic relationship, but saw each other at parties and smoked marijuana together during their work breaks.

On July 21, 2013, defendant and the victim met about 6:00 p.m., during the victim's work break, and drove separately to a nearby park where they smoked marijuana. The victim responded negatively when defendant asked if she felt anything for him. Defendant became upset and asked the victim if she was only there for the marijuana; the victim said yes, and returned to work.

The victim finished her shift about 11:00 p.m., and bought groceries at the Walmart store. Defendant texted the victim, saying he was waiting for her outside and asking where she was. As the victim left the store with her groceries, defendant approached her. Defendant confessed he had feelings for the victim, and asked if she wanted to "get with him"; the victim said, "no."

As the victim put her groceries into the front passenger side of her car, defendant pulled down her pants. Defendant then grabbed her by the hair and pulled her to the driver's seat of her car. He ignored the victim's pleas to let her go. Defendant said he was tired of the victim "fucking around with his head," forced her to her knees, unzipped his own pants, and forced her to orally copulate him. He hit the victim twice on the head; she was scared and began to cry.

At some point, the victim broke free from defendant's grasp and tried to run away. Defendant again grabbed her by the hair and dragged her back to the driver's side of her car. The victim continued crying and pleading with him to let her go. He again forced the victim to orally copulate him, then choked her, threatened her, and groped her.

Defendant told the victim to put her clothes on, but again forced her to orally copulate him. After defendant finally let her go, the victim got back in her car, and drove to the front of the Walmart store. An employee saw the victim crying hysterically, looking disheveled, with bruises on her neck and arms. The victim told this employee, as well as two store managers, that defendant had hit or assaulted her; she did not reveal to those individuals that defendant had sexually assaulted her.

Soon after the assault, defendant was pulled over for failing to stop at a stop sign. He was about one-half to three-quarters of a mile from the Walmart store. He was sweating and seemed to be in a rush, which the officer thought was because he was nervous about being stopped. After giving him a traffic ticket, the officer let him go.

About an hour later, the victim went to the police station to report the sexual assault. While she was at the police station, the victim received a text message from defendant, saying he knew that she had gone into the store after the assault, that it "wasn't cool," and that she needed to tell him where she was and what was going on. A medical examination and testing of samples did not exclude defendant as the source of DNA found underneath the victim's fingernails; the victim thought she might have

scratched defendant, and he had a scratch on his right hand the next day.[1] The victim had fresh abrasions, scratches, and bruises on her arms, knees, forehead, and neck, which were consistent with being grabbed, choked, and forced to her knees in the parking lot.

A surveillance video of the Walmart store parking lot showed defendant and the victim walking out of the store together at 11:44 p.m. They walked toward the victim's car, with the victim pushing a shopping cart. The video showed defendant chase the victim, grab her by the hair, and pull her around her car. The assault itself was not captured on the video.

After a second interview with the police, the victim agreed to place a covert phone call to defendant, which was monitored and recorded. During the call, defendant continuously denied the victim's accusations. When the victim asked him if she should be worried about sexually transmitted diseases as a result of performing oral sex, he said no because he was a "very healthy" man. Defendant then admitted he "might have been a little rough," but thought the victim was into "that kinda rough stuff." He apologized many times, saying, "I'm sorry for forcing myself on you," "it shouldn't a never happened," "I'm sorry for tryin' to take advantage a you," and "I really shouldn't a let it go as far as it did, but it did. Now I'm regrettin' it . . . ." Defendant asked the victim not to involve the police because he was probably going to lose his job and his marriage. He also said he did not want to go to work the next day because he was afraid he might get set up.

Later, several plainclothes police officers interviewed defendant outside his apartment. Defendant was not read his rights under *Miranda*. Defendant ultimately admitted having the victim orally copulate him, touching the victim, forcing her head toward his penis, pulling her hair, putting her in a headlock, and pulling her back into the

[1] No semen was found on the victim's body; the victim admitted she had showered and rinsed her mouth before going to the police station.

car when she tried to run away. Defendant was arrested; during a search incident to the arrest, the officers found cocaine.

Before a second interview at the police station, defendant was read his *Miranda* rights. Defendant confirmed that everything he had previously told the officers was accurate, and then recounted his version of what had happened.

Defendant was charged with forcible oral copulation (Pen. Code, § 288a, subd. (c)(2) [count 1]), sexual penetration by a foreign object and force (*id.*, § 289, subd. (a)(1)(A) [count 2]), and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a) [count 3]). A jury found him guilty of counts 1 and 3, and guilty of the lesser included offense of assault on count 2. In a bifurcated proceeding, the jury found true defendant had two prior strikes (Pen. Code, §§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A)) and two prior serious felonies (*id.*, §§ 667, subd. (a)(1), 1192.7).

The trial court sentenced defendant under the "Three Strikes" law to a total prison term of 35 years to life: 25 years to life on both counts 1 and 3, to be served concurrently, and two consecutive five-year terms for the serious felony priors. The court stayed imposition of sentence on count 2, pending successful completion of the sentence on count 1; the sentence would then be permanently stayed. Defendant filed a timely notice of appeal.

DISCUSSION

I.

MIRANDA *VIOLATION*

Defendant argues that the judgment of conviction must be reversed because the trial court erred in admitting evidence of defendant's police interviews. Defendant argues that his statements were obtained in violation of his rights under *Miranda*. We need not consider the merits of defendant's argument; even if the trial court erred, the error was harmless.

The admission of a defendant's statements obtained in violation of *Miranda* requires reversal of a conviction unless the Attorney General proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) In this case, the victim's testimony alone was sufficient to prove the case against defendant beyond a reasonable doubt. The testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) In addition, the victim's testimony was corroborated by other substantial evidence. First, the surveillance video showed defendant dragging the victim by her hair around her car. Second, the bruises and abrasions observed on the victim's body were consistent with her testimony of how defendant attacked her. Third, the testimony of the Walmart store employee, who encountered the victim immediately after the assault, described the victim's appearance and emotional state in a manner consistent with someone who had just been assaulted. Fourth, defendant's physical and emotional state when he was stopped by a police officer a short time and distance from the Walmart store was consistent with that of a person who had just sexually assaulted a woman. Finally, defendant's statements during the covert call corroborated the victim's testimony.

In light of the overwhelming evidence of defendant's guilt, any error in admitting the evidence of his statements to the police was harmless beyond a reasonable doubt.

II.

RESENTENCING

Defendant argues, and the Attorney General concedes, that defendant must be resentenced on count 3. The trial court sentenced him to a term of 25 years to life on count 3, pursuant to the Three Strikes law.

Under the Three Strikes law, as amended by the Three Strikes Reform Act of 2012, enacted by popular initiative as Proposition 36, if a defendant has two prior

serious and/or violent felony convictions, but the current offense is not a serious or violent felony conviction, he or she should not be sentenced to a life term; rather, he or she should be sentenced to a term that would be twice the term otherwise provided for the current offense. (Pen. Code, § 667, subd. (e)(1) & (2)(C).) An exception to this rule provides that the defendant may still be sentenced to a life term if the prosecution pleads and proves one of four criteria regarding the current offense, or the prior serious and/or violent felony convictions. (*Id.*, § 667, subd. (e)(2)(C).)

Defendant's conviction for possession of cocaine under Health and Safety Code section 11350, subdivision (a) (count 3) is not a serious or violent felony under Penal Code section 667.5, subdivision (c) or Penal Code section 1192.7, subdivision (c). Further, defendant's conviction on count 3 does not satisfy any of the criteria under Penal Code section 667, subdivision (e)(2)(C). Under these circumstances, it was improper for the trial court to sentence defendant to a term of 25 years to life on count 3. We therefore remand this matter to the trial court for resentencing on that count.

DISPOSITION

The judgment is affirmed. The matter is remanded for resentencing on count 3.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.